No. 85-2115

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WHITTAKER CORPORATION,
Petitioner,

VS.

PERRY D. JENKINS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' COUNTERSTATEMENT OF THE CASE

On May 11, 1978, while taking part in a demolitions demonstration at a military training ground at Pohakuloa on the Island of Hawaii, Specialist Four Jeffrey Jenkins of the 65th Engineer Battalion was fatally injured when an M-142 atomic simulator that had already been detonated once exploded a second time while he was nearby. The simulator is basically a 55-gallon steel drum into which explosive powder charges have been packed which, when detonated, will simulate the visual and aural effects of a nuclear blast on the ground.

Two simulators were scheduled to be detonated as part of the morning's training exercises. The first, made by Petitioner Whittaker Corporation (hereinafter "Whittaker"), had detonated routinely. The second one, made by a different company, failed to detonate on the first attempt. Some fifteen to thirty minutes had

elapsed from the time the first simulator had exploded when Jenkins, together with two senior officers, approached the Whittaker simulator to transfer its ignition wires, which had functioned properly earlier, to the second simulator. Although heat waves and flames could still be seen rising from the barrel, the officers did not foresee any danger because they had observed a normal detonation of that simulator, nearly half an hour had gone by, and they expected debris in the bottom of the barrel to continue to burn. While he was transferring the ignition wires from the first simulator to the second, Jenkins and the two officers with him were lifted off their feet and thrown back by the force of a blast which numerous eyewitnesses said came from the burning barrel of the first simulator. Jenkins, twenty years old, died from his injuries later that evening at Tripler Army Hospital in Honolulu.

His parents and his estate brought suit against petitioner Whittaker in Hawaii. They contended that the simulator had been defectively designed and manufactured, and presented claims against Whittaker based on strict liability, breach of warranty, and negligence. Following trial in the United States District Court, the jury returned a verdict upon special interrogatories, pursuant to which it found no defect in the design of the simulator, but a defect in its manufacture. The jury also found that Whittaker had breached warranties and had been negligent, and awarded damages in the total amount of $300,000. Judgment was entered on August 29, 1983. Ten days later, Whittaker moved for judgment n. o. v. or in the alternative for a new trial. On September 30, 1983, plaintiffs filed a motion for award of prejudgment interest pursuant to Haw. Rev. Stat. § 636-16 (Supp. 1984)[1] and Rule 7 of the Federal Rules of Civil Procedure.

The court subsequently denied all of the motions. Following various procedural steps under which it twice reconsidered re-

[1] This statute reads as follows: "In awarding interest in civil cases, the judge is authorized to designate the commencement date to conform with the circumstances of each case, provided that the earliest commencement date in cases arising in tort, may be the date when the injury first occurred and in cases arising by breach of contract, it may be the date when the breach first occurred."

spondents' motion for prejudgment interest, the court finally ruled that it was unable to grant the motion because it had been filed outside the ten-day period permitted by Rule 59(e) for alteration or amendment of a judgment. Whittaker appealed, and respondents cross-appealed.

Whittaker's brief on appeal presented ten questions for review, ranging from in personam jurisdiction and choice of law to rulings on the exclusion of evidence. (*See* Appendix A-5 through A-7, *infra*, for a copy of the Table of Contents of Whittaker's opening brief on appeal.) Whittaker did not argue on appeal that it was immune from liability because of its status as a military contractor, however. (Nor had Whittaker presented this defense in the district court. [*See* Appendix A-1—A-4, *infra*, for a copy of the answer filed by Whittaker to the complaint.] At trial, Whittaker had asked for and received an instruction to the jury that it could not be liable for a design defect in the simulator if the jury found that the government had specified and approved the design, that Whittaker had produced the simulator in accordance with specifications, and that Whittaker had communicated fully to the government all concerns it had about the safety of the design. As noted earlier, the jury specially found that there was no design defect in the simulator.)

The Ninth Circuit, in a thorough and carefully crafted opinion, considered and rejected each of Whittaker's grounds for appeal, and affirmed the jury verdict. On respondents' cross-appeal, and applying the holding of this Court in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 450-52 (1982), it held that Rule 59(e) did not apply to a first-time motion for prejudgment interest following entry of judgment, and that respondents' motion had been timely. Because the Hawaii statute involved called for an award of prejudgment interest in the discretion of the court (*see* n. 1, *supra*), it reversed the order denying respondents' motion and remanded the case to the district court for exercise of its discretion in deciding whether and for what period to award prejudgment interest.

REASONS FOR DENYING REVIEW

I

THE ISSUE OF A MILITARY CONTRACTOR'S IMMUNITY FROM LIABILITY FOR DEFECTIVE MANUFACTURE WAS NOT RAISED OR PASSED ON IN THE COURT BELOW, AND IS NOT AN ISSUE WORTHY OF CERTIORARI IN ANY EVENT

Petitioner Whittaker asks this court to grant certiorari to review what it calls "an important question of federal law"—whether military contractors should be immune from suit by servicemen injured in the course of duty. There are two significant problems with Whittaker's request: it did not raise or brief the immunity issue to the Ninth Circuit, which consequently did not rule on the question; and the issue is unworthy of certiorari in any event.

A. The Issue Was Not Briefed or Decided Below

This Court does not normally review questions raised for the first time in a petition for certiorari. *Adickes v. S. H. Kress and Company,* 398 U.S. 144, 146 n.1, and authorities cited (1970). Whittaker did not present any defense of immunity in its answer filed in the district court. (*See* Appendix A-1—A-4, *infra.*) It did get a jury instruction on the military contractor defense insofar as it applied to plaintiffs' claim of a design defect in the simulator, but then the jury found that there *was* no design defect, and instead held Whittaker liable for a manufacturing defect. At that point the whole immunity issue became moot, since the military contractor defense is not applicable to a claim of mismanufacture (*infra,* at 5-6). On appeal to the Ninth Circuit, Whittaker first sought and was refused permission to file an over-lengthy brief in order to raise ten questions which it considered essential to present to the Court of Appeal. When it subsequently shortened its brief to the required fifty pages, Whittaker still presented ten questions for review by the Ninth Circuit. However, the questions so briefed and argued did not include the issue of immunity which Whittaker now wants this Court to "review." (*See* Appendix A-5—A-7, *infra.*) Certiorari, therefore, should be denied for this reason. *Miree v. DeKalb County,* 433 U.S. 25, 33-34 (1977); *Tennessee v. Dunlap,* 426 U.S. 312, 316 n.3 (1976).

B. There is No Statutory or Other Policy Basis for Granting Immunity to Manufacturers of Defective Military Products

Whittaker's argument for certiorari on the issue of immunity for military contractors essentially is an argument that a manufacturer who fails to follow government specifications and assembles a defective weapon or other item for use by the military should be immunized from liability for resulting death or injury to a serviceman.

This argument has been made before (although not by Whittaker in this case). It has been rejected as wrong by each court to consider the matter. What the courts have found is that it is the fact that a product *fails to conform to specifications* that causes problems with military procurement—the government did not receive the product it had asked for and thought it was buying. Consequently, Whittaker's argument is not worthy of certiorari in this case.

The Eighth Circuit gave perhaps the most direct answer to the argument when it said, in a case involving death and personal injury from a prematurely exploding grenade:

> In making the grenade and its component parts the defendants knew that it was made for military personnel and that it was to be used by them. We believe the public interest in human life and health requires the protection of the law against the manufacture of defective explosives, whether they are to be used by members of the public at large or members of the public serving in our armed forces.[2]

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[2] Foster v. Day & Zimmermann, Inc., 502 F.2d 867, 871 (8th Cir. 1974). Subsequent decisions in *design* cases have each been careful to distinguish *Foster's* rule of liability for manufacturing defects. *E.g.,* Bynum v. FMC Corporation, 770 F.2d 556, 564 (5th Cir. 1985) ("*Bynum*"); Shaw v. Grumman Aerospace Corporation, 778 F.2d 736, 740, 745-46 (11th Cir. 1985), *application for cert. on other grounds pending* (1986) ("*Shaw*"). The court in *Foster* also followed a prior holding in Whitaker v. Harvell-Kilgore Corporation, 418 F.2d 1010, 1013-15 (5th Cir. 1969), that sovereign immunity did not extend to an independent contractor alleged to have manufactured defective weapons for the military. 502 F.2d at 873-75. The continuing validity of *Whitaker*

Since the holding in *Foster* just quoted, there has evolved a doctrine which has come to be known as the "government contractor defense" or "military contractor defense."[3] The defense provides a limited immunity to a military contractor in cases involving defects in the *design* of military products whose specifications have been rigidly controlled by the government because of a particular military need or application. The defense has no relevance in cases involving defects in the *manufacture* of military products: as an element of the defense, the contractor must prove that he *followed and complied* with military specifications. *E.g., Shaw,* 778 F.2d at 740, 744-46: *Bynum,* 770 F.2d at 564.

Whittaker's argument seeks to expand the military contractor defense from a limited exception in cases of liability for a government-dictated design to a general immunity in all cases of liability for both defective design *and* defective manufacture. In support of this position, Whittaker cites the rationale offered in *McKay v. Rockwell International Corporation,* 704 F.2d 444, 449 (9th Cir. 1983), another design defect case. The court in *McKay,* however, expressly distinguished its rationale as follows:

> We also note that the rule enunciated here does not relieve suppliers of military equipment of liability for defects in the manufacture of that equipment. To hold otherwise would remove the incentive from manufacturers to use all cost-justified means to conform to government specifications in the manufacture of military equipment.

704 F.2d at 451. *See also Foster,* 502 F.2d at 874 n.5 ("The government's specifications did not call for the defendants to assemble a defectively made grenade"), and cases cited *supra,* n.2.

Whittaker's reliance on *Feres v. United States,* 340 U.S. 135 (1950), and on *Stencel Aero Engineering Corp. v. United States,*

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has never since been questioned. *See, e.g., Bynum,* 770 F.2d at 564; *Shaw,* 778 F.2d at 740.

[3] *See, e.g.,* Boyle v. United Technologies Corporation, No. 85-2264 (4th Cir., May 27, 1986) (Appendix to Petition for Certiorari, at G1); *Shaw,* 738 F.2d at 740-46, and cases cited.

431 U.S. 666 (1977), is misplaced. In those cases, the Court held that imposing liability *on the government* would lead to an impairment of military discipline and to the second-guessing of military decisions by the courts. In contrast, holding a manufacturer responsible for his failure to follow military specifications does not lead to such a result. The manufacturer will always try to prove, as Whittaker did in the instant case, that it was free from fault, and that the accident happened due to negligence on the part of the government. The manufacturer's right to compel testimony may cause evidence to be given by members of the armed forces as to each others' actions, and the weighing of that evidence in the context of evaluating the manufacturer's liability, but the judgment, if any, will be against the manufacturer, and not against the goverment or the military. The "uniquely federal relationship" between the government and its soldiers, which was cited in *Feres* and *Stencel,* is not threatened where the court's judgment cannot bind the military, or make it change its standards or behavior. Given *Feres* and *Stencel,* the most that a judgment can do which finds the government responsible for an injury is absolve the manufacturer.

On the other hand, and compared with the special relationship between a government and its soldiers, there is nothing more uniquely federal about the relationship between a military supplier and the government than there is about the relationship between a supplier and *any* agency of the government. *See, e.g., Jaffee v. United States,* 663 F.2d 1226, 1233 n. 7 (3d Cir. 1981) (*en banc*), *cert. denied,* 456 U.S. 972 (1982). It is hardly possible for Whittaker to contend, for example, that the supply of its simulators (which are pyrotechnic devices used in demonstrations, and not in combat) is any more crucial to the country's defense than is the supply of encyclopedias or movies to goverment libraries: both supply examples of what a nuclear explosion looks and sounds like, and the library materials furnish a great deal more information besides. In the final analysis, *all* government procurement policies, and not just the military's, are adversely affected by negligent manufacture. The consequences of defective components in an FAA radar can be just as costly, if not more, than the consequences of a negligently assembled howit-

zer.[4] There is thus no basis for affording special tort immunity just to military suppliers for their own carelessness in manufacture.

To be sure, Whittaker claims that it does not ask that military contractors "be absolved of responsibility for defective products" (Petition for Certiorari, at 10). But in suggesting that existing remedies against military contractors for false claims (18 U.S.C. § 287), false swearing (18 U.S.C. § 1001), and for mail and wire fraud (18 U.S.C. §§ 1341, 1343) are adequate to cover the case of a serviceman killed or maimed by a defectively manufactured product, Whittaker shows the impoverishment of its argument. The issue it raises is unworthy of certiorari, and Whittaker's request should be denied.

II

THE CHOICE OF FEDERAL LAW IS IRRELEVANT, SINCE THE MILITARY CONTRACTOR'S DEFENSE IS INAPPLICABLE AND OTHER FEDERAL LAW DOES NOT DIFFER FROM THE STATE LAW APPLIED IN THIS CASE

The second question on which Whittaker requests certiorari is as unworthy of review as the first. Whittaker asks that a common federal law be declared applicable to all suits by servicemen against military suppliers. As will be seen, the only possible advantage that Whittaker could gain by such a result is that the military contractor's defense would receive general recognition

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[4] To the extent that a manufacturer of defective products is forced to bear the costs of its negligence, the result may well be to raise the cost of the military's dealing *with that particular manufacturer*. The purpose of competitive bidding, however, is precisely to weed out those manufacturers who are not cost-effective. Whittaker's argument makes the wholly unsupported assumption that most or all manufacturers are negligent, so that competitive bidding will not be effective to screen out costs due to liability. Even if that were the case, however, Whittaker does not explain why a court, rather than Congress, should make the social policy decision that soldiers (and the government via the Veterans Benefits Act) should bear the costs of negligent manufacture rather than the contractor.

—in *design defect* cases. (*See* argument *supra,* at 5-6.) Since this case involves a manufacturing defect, Whittaker profits nothing by its argument.

Given that the United States itself has consented to be held liable in tort under the respective and differing laws of the fifty states, 28 U.S.C. § 2674, and given that as a manufacturer whose distribution is nationwide, Whittaker is subject to varying state standards under current law, respondents submit that there is no reason to supplant traditional state-law concepts of tort just for manufacturers of defective military products, like Whittaker. Except for the military contractor defense, Whittaker cannot show any area in which federal common law, if held applicable, would be different from state law. This is particularly true with respect to the issues of strict liability, negligence, *res ipsa loquitur* and damages involved in this case.[5] As discussed in the previous section, there are no military policy or procurement issues at stake

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[5] As Whittaker recognizes (Petition at 13, n. 9), any federal law in this area would probably be drawn from the "well developed body of federal admiralty law." But it is precisely because admiralty law, in turn, has drawn upon *state tort law* that the concepts of strict liability and *res ipsa loquitur* do not differ under the respective jurisdictions. (We speak here of the Hawaii law applied in this case; as the Ninth Circuit noted, California's law on *res ipsa* is slightly different.) *See* Lindsay v. McDonnell Douglas Aircraft Corporation, 460 F.2d 631, 635-36 (8th Cir. 1972); Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co., 565 F.2d 1129, 1134-35 (9th Cir. 1977) (applying strict liability as matter of general maritime law); Johnson v. United States, 333 U.S. 46, 48-49 (1948); Cox v. Northwest Airlines, Inc., 379 F.2d 893, 895 (7th Cir. 1967), *cert. denied,* 389 U.S. 1044 (1968) (applying *res ipsa loquitur* to cases under Jones Act and Death on the High Seas Act).

There is no federal statute of limitations which Whittaker can cite for products liability claims, nor is there a federal statute (other than in an admiralty context—see 46 U.S.C. § 761 et seq.) specifying damages in the event of wrongful death. To the extent federal courts are called on to supply rules of decisions in these areas, they quite justifiably draw on, and in some instances are directed to, state law. (*See, e.g.,* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 405-08 [1970]; Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 583-595 [1974].) Thus Whittaker cannot show how resort to federal common law in this case would

in a case involving a defectively *manufactured* product. The military is just as entitled as a civilian consumer to receive a product that has been properly assembled and is fit for its intended use. *See* argument *supra,* at 5-8; *see also Challoner v. Day & Zimmermann, Inc.,* 512 F.2d 77, 84 (5th Cir.), *vacated on other grounds,* 423 U.S. 3 (1975). In vacating and remanding *Challoner,* this Court left it open to the Court of Appeals to determine which law would apply to claims of death and personal injury due to a defectively manufactured howitzer that exploded prematurely in Cambodia. Each court in *Challoner* assumed that under Texas choice-of-law principles, Cambodian law (the law of the place of injury) might well apply; there was no indication that the federal interests at stake were such as to require application of federal common law.

Whittaker's argument not only proceeds from a false assumption (that the military contractor defense applies to cases of manufacturing defects), it arrives at an erroneous conclusion (that federal common law would differ significantly from Hawaii law on traditional tort concepts of negligence, strict liability and *res ipsa loquitur*). For these reasons, the petition should be denied with respect to Whittaker's second question presented for review.

III

THE JUDGMENT BELOW CORRECTLY HOLDS THAT RULE 59(e) DOES NOT APPLY TO THE INITIAL GRANTING OF RELIEF, BUT ONLY TO THE CORRECTION OF ERROR

The court below properly decided that a first-time, postjudgment motion for prejudgment interest following a successful verdict is not subject to the strict ten-day limitation of Fed. R. Civ. Proc., Rule 59(e). In doing so, the Ninth Circuit applied the principles which this Court declared in *White v. New Hampshire Department of Employment Security,* 455 U.S. 445 (1982). There is no conflict between this decision and the decisions of any

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have produced a different result with respect to any of the issues it involved.

other circuit. Furthermore, the decision is correct, and so there is no need to grant certiorari.

In *White,* this Court held that a postjudgment, first-time motion for attorneys' fees under 42 U.S.C. § 1988 raises "legal issues collateral to the main cause of action—issues to which Rule 59(e) was never intended to apply." 455 U.S. at 451. Rule 59(e) was intended to deal with the correction of error in a judgment before it became final. A judgment which neither granted nor denied attorneys' fees because the court had not yet been asked to address the issue (and could not be asked until one party had prevailed) incorporated no error in need of correction.

Precisely the same points that were true of the motion for attorneys' fees in *White* are true of the first-time, postjudgment motion for prejudgment interest filed in this case. The motion "does not imply a change in the judgment, but merely seeks what is due because of the judgment" (*id.* at 452). Prejudgment interest may be awarded

> only to a "prevailing party." Regardless of when [it is] requested, the court's decision of entitlement to [interest] will therefore require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has "prevailed." Nor can [prejudgment interest] fairly be characterized as an element of "relief" indistinguishable from other elements. Unlike other judicial relief, [prejudgment interest is] not compensation for the injury giving rise to an action. [Its] award is uniquely separable from the cause of action to be proved at trial . . . .

Id. at 451-52 [substituting "interest" for "attorney's fees"]. As the Ninth Circuit also noted, "Prejudgment interest compensates not for the *injury* giving rise to the action, but for the *delay* between injury and judgment. . . . Both attorney's fees and prejudgment interest seek what is due because of the judgment, the former in terms of money expended, the latter in terms of time." 785 F.2d at 737 (emphasis in original).

The cases which Whittaker cites as being in conflict with the Ninth Circuit's decision in this case are in reality distinguishable on their facts.[6]

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[6] In Elias v. Ford Motor Co., 734 F.2d 463 (1st Cir. 1984), the original judgment already included an award of prejudgment interest, and the plaintiff had declined to appeal it. The *Elias* court's assertion that prejudgment interest is not a "collateral matter" like attorney's fees must thus be taken in the context of the case, in which the plaintiff was seeking to correct an alleged error in the prejudgment interest he had been awarded.

In Stern v. Shouldice, 706 F.2d 742, 746-47 (6th Cir. 1983), the plaintiff had actually brought a motion for prejudgment interest within ten days of judgment, and jurisdiction on appeal depended on whether the motion could be classified as a 59(e) motion. Ordinarily a postjudgment motion will be granted or denied separately from the judgment, and the appeal is taken from both the judgment and the postjudgment order. But there is nothing in Rule 59 to prevent a party from seeking to have the court actually incorporate additional relief in the body of the judgment, provided only that he makes application to do so within ten days—and that is what the plaintiff had done in *Stern*. Thus the case is not in conflict with the decision below.

Goodman v. Heublein, Inc., 682 F.2d 44, 45-47 (2d Cir. 1982) involved a motion that was presented only after the appeal from the damage award had become final, and is thus to be contrasted with the Second Circuit cases cited in the text before n. 7, *infra*, in which the court corrected the judgments to allow prejudgment interest while it still had jurisdiction of the appeals.

Spurgeon v. Delta Steamship Lines, Inc., 387 F.2d 358, 358-59 (2d Cir. 1967), was a pre-*White* case in which the original judgment again had included prejudgment interest, but had not been appealed; Glick v. White Motor Co., 458 F.2d 1287, 1293-94 (3d Cir. 1972), involved a judgment which should have included an award of prejudgment interest mandated by statute, and thus it was subject (after the ten-day period of Rule 59[e] had lapsed) to correction under Rule 60(a). Finally, the court in Gilroy v. Erie-Lackawanna R.R. Co., 44 F.R.D. 3, 4 (S.D.N.Y. 1968) mentioned in dictum that a motion for discretionary prejudgment interest is properly brought under Rule 59(e), but its principal holding was that plaintiff would not have been entitled to prejudgment interest in any event.

Finally, the ruling below is also proper because the Ninth Circuit had, independently of the district court, power to correct the denial of prejudgment interest on direct appeal from the judgment. (*See Mallis v. Bankers Trust Co.*, 717 F.2d 683, 692-93 [2d Cir. 1983]; *Newburger, Loeb & Co. v. Gross*, 611 F.2d 423, 432-33 [2d Cir. 1979]; *cf. Adams v. Lindblad Travel, Inc.*, 730 F.2d 89, 93 [2d Cir. 1984].) Thus a grant of certiorari on Whittaker's third question, even if this Court were to decide to review what is an interlocutory decision on prejudgment interest, would not alter the outcome below.[7] For these reasons, therefore, certiorari of Whittaker's third question should be denied.

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[7] The Ninth Circuit reversed the judgment of the district court and remanded the case for a determination in the first instance of whether, in the district court's exercise of discretion, prejudgment interest should be awarded to plaintiff. The judgment fails to award any relief to plaintiff on the interest sought; it is thus not a final judgment. Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737 (1976). While that fact does not preclude certiorari under 28 U.S.C. § 1254(1), this Court's policy of avoiding review of interlocutory orders except on important questions "fundamental to the further conduct of the case," United States v. General Motors Corp., 323 U.S. 373, 377 (1945), is thus another reason to deny certiorari.

IV
CONCLUSION

The petition for certiorari filed by Whittaker does not present any issues worthy or in need of review by this Court. The issue of military contractor immunity for manufacturing defects was neither pleaded, briefed nor argued in either the district court or the court of appeals. The issue of federal common law is a red herring, given that the military contractor defense is inapplicable to a manufacturing defect case such as this one, and given that remaining federal law would not demonstrably have altered the outcome of this case in any event. Last but not least, the issue of prejudgment interest was correctly decided on at least two grounds, and does not present any conflict with existing law.

For the reasons herein stated, respondents request that this Court deny the petition for certiorari.

Respectfully submitted,

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Whittaker Corporation

In the United States District Court
For the District of Hawaii

Civil No. 80-0195

Perry D. Jenkins, Annabelle Jenkins, and Stuart A. Kaneko
as Special Administrator of the Estate of
Jeffrey Scott Jenkins, Deceased,
Plaintiffs,

vs.

Whittaker Corporation, dba Bermite Corporation,
a Division of Whittaker Corporation,
a California corporation, John Does 1-10,
Doe Corporations 1-10, and Doe Partnerships 1-10,
Defendants.

ANSWER TO COMPLAINT

Whittaker Corporation (hereinafter "Whittaker"), one of the Defendants above-named, for answer to the Complaint filed herein, alleges as follows:

FIRST DEFENSE

1. Plaintiffs' Complaint fails to state a claim against Whittaker upon which relief can be granted.

SECOND DEFENSE

COUNT I

2. Whittaker admits the allegations contained in paragraphs 2, 3 and 4 of the Complaint.

3. Whittaker denies the allegations contained in paragraphs 5, 6, 7, 8, 9 and 10 of the Complaint.

4. Whittaker is without information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint.

COUNT II

5. In answer to paragraph 11, Whittaker realleges and reaffirms the responses given in answer to paragraphs 1 through 10 of the Complaint.

6. Whittaker denies the allegations contained in paragraphs 12 and 13 of the Complaint.

COUNT III

7. In answer to paragraph 14, Whittaker realleges and reaffirms the responses given in answer to paragraphs 1 through 13 of the Complaint.

8. Whittaker denies the allegations contained in paragraphs 15, 16 and 17 of the Complaint.

COUNT IV

9. In answer to paragraph 18, Whittaker realleges and reaffirms the responses given in answer to paragraphs 1 through 17 of the Complaint.

10. Whittaker denies the allegations contained in paragraph 19 of the Complaint.

COUNT V

11. In answer to paragraph 20, Whittaker realleges and reaffirms the responses given in answer to paragraphs 1 through 19 of the Complaint.

12. Whittaker denies the allegations contained in paragraph 21 of the Complaint.

COUNT VI

13. In answer to paragraph 22, Whittaker realleges and reaffirms the responses given in answer to paragraphs 1 through 21 of the Complaint.

14. Whittaker denies the allegations contained in paragraph 23 of the Complaint.

15. Whittaker denies any and all other allegations in the Complaint.

THIRD DEFENSE

Plaintiffs' damages, if any, were caused by the negligence of Plaintiffs' decedent or others and Plaintiffs' claim against Whittaker is barred, or reduced, because of said negligence.

FOURTH DEFENSE

Plaintiffs' decedent or others misused or altered the subject product and Plaintiffs' claims are barred as a result of such misuse or alteration.

FIFTH DEFENSE

The subject product met all applicable safety standards and Plaintiffs' claims are barred as a result.

SIXTH DEFENSE

The Court lacks jurisdiction over Whittaker.

SEVENTH DEFENSE

Plaintiffs are barred from maintaining this action by reason of Plaintiffs' decedent's voluntary assumption of a known risk.

EIGHTH DEFENSE

Plaintiffs' claims are barred by the statute of limitations.

NINTH DEFENSE

Plaintiffs' claims are barred by Plaintiffs' failure to provide timely notice of the breach of any warranties as they now allege in their Complaint.

WHEREFORE, Whittaker prays that:

1. Plaintiffs' Complaint against it be dismissed;

2. The Court award Whittaker its reasonable costs and attorney's fees; and

3. The Court order such other relief as it deems equitable and proper.

Dated: Honolulu, Hawaii, May 30, 1980.

/s/ . SUSAN P. WALKER
Burnham H. Greeley
Susan P. Walker

Attorneys for Defendant
WHITTAKER CORPORATION

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